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No. 86-397

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHURCH OF ST. PAUL AND ST. ANDREW,
Petitioner,

v.

KENT L. BARWICK, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The New York Court Of Appeals

BRIEF FOR THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., NEW YORK STATE COUNCIL OF CHURCHES, INC., THE COUNCIL OF CHURCHES OF THE CITY OF NEW YORK, AND QUEENS FEDERATION OF CHURCHES AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

I. May a municipality, consistent with the Free Exercise Clause of the First Amendment, permanently commandeer or sequestrate the exterior facade of a church building over the continuous objection of the church congregation which owns, occupies and operates it as an active house of worship, without compensation, not for reasons of public health or safety, nor to use the property for other compelling public purposes, but solely for aesthetic purposes?

II. May the municipality also require the congregation and its leaders, under pain of criminal penalties, to maintain the facade in its present (or equivalent) condition at their own expense, using resources donated for religious ministries, whether or not any are left for the free exercise of religion?

III. May the church congregation be required to apply for relief to the very municipal agency that commandeered its property in the first place and to prove its condition of "hardship" to submit its inventory of assets, its program and budget, its fund-raising prospects, its plans and aspirations for religious ministries, liturgical observances, and community service, which determine the uses of its premises, for evaluation, disputation and possible modification by civil appointees whose mandate and expertise is architectural, not financial, and certainly not religious.

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Pursuant to Rule 26.1 of the Rules of this Court, the organizations named above filed this brief in support of the instant petition for certiorari. Consent for filing of this brief has been obtained in writing from the attorneys of record for the parties in this case. Their original letters have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

1. The National Council of the Churches of Christ in the U.S.A. is a community of thirty-one Protestant and Eastern Orthodox communions having an aggregate constituency of over forty million members in the United States. These national religious bodies are deeply concerned about the effect which this case and its disposition will have on the free exercise of religion of their constituent congregations across the entire country.

2. The New York State Council of Churches is a not for profit corporation in the State of New York that has served the Protestant constituency of New York for more than a century. It has a long tradition of involvement in seeking justice and equity in matters of church and state. It is particularly concerned at this time about the impact of New York City and New York State laws regarding landmarking. New York City laws clearly make it possible for municipal government to usurp the mission of a local church, its related judicatory and denomination.

3. The Council of Churches of the City of New York represents over 1,600 Protestant and Orthodox congregations and 27 denominations and affiliated agencies. With them it shares a belief in one Lord, Jesus Christ, and works to strengthen the social, moral and spiritual quality of life in the City. It began its work in 1815 as the Brooklyn Mission Society, and is the oldest ecumenical organization in the nation. The Council is deeply concerned that landmark status restrains the opportunity for churches to serve God as they see fit.

4. Queens Federation of Churches, organized in 1931 serves over 600 Christian Churches in the Borough of Queens, City of New York, it is profoundly concerned that churches be able to use their own resources in fulfillment of the ministry to which God calls them. It sees landmarking of religious property as imposing a requirement that government permission be obtained in order to use church property for religious ministry.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

"U.S. Constitution, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Constitution, Amendment XIV:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

New York City Landmarks Preservation Law (N.Y.C. Admin. Code, Ch.8-A, § 205-1.0 and § 207-1.0, *et seq.*)

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The questions to be decided are not administrative, but constitutional, not whether the Commission has decided the matter wisely, or whether it will handle the "hardship" proceeding compassionately, but rather, whether it has any "authority to adjudicate" the matter at all. *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. ____, 105 S.Ct. 3325, 3332-33 (1985). The Commission is not in a position to decide constitutional questions, and certainly cannot be expected to do so against its own supposed interest. Moreover, the New York courts have failed to recognize and protect the important free exercise interests at stake here.

The New York situation complained of in this case is not a condition of religious liberty, but its opposite, religious oppression, and should not be permitted under the Constitution of the

United States. The remedy proposed by the courts of New York is not a remedy, but an exacerbation of the problem, since it leaves the church's religious freedom in the hands of the civic agency which originally impaired it.

Even if all members of the Commission were theologians or ordained clergy, as civil appointees they must be considered "outsiders," and as such, they have no business making decisions for a functioning and competent church body. The prospect of any religious body having to submit its programmatic plans and budget, all of which are based upon religious considerations and commitments, to a civic agency for approval is anathema to *amici* and contrary to the teaching of this Court with respect to the Free Exercise Clause of the First Amendment.

REASONS FOR GRANTING THE WRIT

The outcome of the instant case will have a momentus effect on churches everywhere. A failure of this Court to act will have devastating effects, since the preservationist effort is already far advanced in many regions of the country.

New York State and New York City have led the way in legislation and administration of preservationist interests, and their example is being widely followed throughout the land. Consequently, many denominations in many localities are beginning to encounter the same difficulties that the United Methodist Church of St. Paul and St. Andrew is resisting in the instant case.

The churches represented in this brief are not opposed to architectural preservation as such. Since the beginning of the colonial period, churches have erected, maintained and cherished some of the finest ecclesiastical architecture in this country. It is therefore most ironic that it is this distinction which places the church at the center of this dispute. In New York City, for example, more than 14 percent of the site-designated landmarks are religious buildings. Religious buildings com-

prise less than 0.34 percent of the buildings in the City of New York. In other words, churches and synagogues are forty-two times more likely to be designated as landmarks than any other buildings in the city.[1]

In a valiant effort to celibrate and conserve the architectural mastery of the churches' structures, the preservationist movement would actually destroy the churches' ministry. Like the now extinct Bald Eagle, another great American symbol of mastery, the church has fallen prey to the very excellence which accorded it distinction, and is now left to be stuffed and mounted for mere asthetic appreciation.

The church is not without appreciation for the ornate intricacies of its property. Nevertheless, in recognition of its primary role in the community, the church has had to withstand the temptation to value its buildings over its ministry meeting and serving the needs of human beings. When balancing the two, more weight must be placed on its ministry. To do otherwise could be tantamount to idolatry. The concentration of its resources on the exterior facade creates the "edifice complex" which theologian Gibson Winter described in criticizing churches which are more attached to their large, ornate, cathedral-like structures than to adapting to the spiritual needs of a mobile population.[2] Thus, the civic designation of church buildings as "landmarks," which serves to freeze them in the forms and functions of the past, is in direct contradiction to the church's free exercise of its faith as guaranteed by the first amendment.

Such civil action focuses attention solely on the immutability of the outward appearance of the church building rather than on the mutable ministrations to the ever-changing spiritual and

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[1] L'Heureux, N.J., "Ministry v. Mortar: A Landmark Conflict,: in Kelley, Dean M., ed., *Government Intervention in Religious Affairs*, 2, N.Y., Pilgrim Press, 1986, p. 168.

[2] Winter, G., *The Suburban Captivity of the Churches*, Garden City, Doubleday, 1961, p. 148.

social needs of the human beings within. In effect, it transmutes the church building into a civic museum, maintained as an ornate shell commemorating the grandeur of bygone vitality and aspiration. The pattern of governmental expropriation of church buildings for use as museums is usually associated with the Soviet Union, but there the government at least pays for the upkeep of the structure. Under New York's Landmarks Preservation statute, the church congregation itself is obliged—under criminal penalties to pay the cost of maintaining outmoded and deteriorating architecture for its supposed aesthetic effect, a burden that can quickly exhaust the devotion and extinguish the good will of the congregation, who resent having to feed an insatiable architectural incubus before they can minister to the spiritual needs of living men, women and children.

This concern of the churches does not exclude the possibility that some congregations may be gratified and encouraged to have their church building(s) designated as landmarks. Where the congregation consents, the situation is entirely different. A time may come when the landmarked building is no longer suitable for its original, religious purpose. At that time the church must be able to withdraw its consent and the designation consequently be vacated. In the Final Report of the Interfaith Commission to Study The Landmarking of Religious Property (hereafter cited as the "Interfaith Commission"), the religious leaders of the City of New York seek a revision of the law. The proposed revision would make the landmarking of churches and synagogues contingent upon the consent of the religious body concerned,[3] unfortunately, the legislature has not yet amended the law, in part because of the organized opposition of historic preservationists, most of whom have not contributed a cent to the construction or upkeep of the landmarked church structures, and will not do so in the future.

The churches represented by this brief are troubled about the effect upon religious liberty of permitting a municipality to

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[3] *See* L'Heureux, *op. cit.*, pp. 178-79.

take over control of the outside of a church, in perpetuity, and to require the voluntary, worshiping congregation, under criminal penalties, to maintain the facade in its present condition, whether or not it has money left for religion.

The churches are even more concerned about the effect of the decisions of the New York courts, which would leave the church no remedy but to submit to the unfettered discretion of the Landmarks Preservation Commission, which has hitherto shown no comprehension of, or compassion for, the religious needs of churches. Indeed, the Commission is not equipped, able, or even inclined to weigh financial, let alone religious, considerations in its deliberations. Although the Commission may be qualified to supervise the replacement of decaying limestone cornices with identical terra cotta limestone (which in turn will soon decay under the impact of modern automotive exhaust fumes), the Commission is not qualified to weigh the merits of the former as against expanding kitchen facilities and constructing access ramps for the senior-citizen feeding programs, which further the church's religious outreach in the community.

The Writ should be granted because this case is of great national importance and because it has been decided in a way that is inconsistent with principles applied in prior decisions of this Court.

I. THE DESIGNATION OF THE CHURCH OF ST. PAUL AND ST. ANDREW AS A LANDMARK IMPOSES AN IMPERMISSIBLE BURDEN ON THE FREE EXERCISE OF RELIGION.

The United States Supreme Court has adopted a balancing test to be applied to determine when the government has violated the free exercise of religion. This test, as announced in *Braunfeld* v. *Brown*, 366 U.S. 599, (1961) is:

> [I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goal, the statute is valud

> despite its indirect burden on religious observance *unless the State may accomplish its purpose by means which do not impose a burden.*

Id. at 607 (emphasis added).

The *Braunfeld* test is applicable to landmark statutes because they are general laws which advance the State's purpose while burdening religion. The purpose of the landmarks statute—to preserve examples of significant architecture, § 205-1.0(b)—may be a valid secular purpose; however, it does not meet the *Braunfeld* test as refined by *Sherbert* v. *Verner*, 374 U.S. 398 (1963), where this Court stated that there must be some "compelling interest . . . [to justify] the substantial infringement of appellant's first amendment right." *Id.* at 406. Thus, applying the *Sherbert* test, the State must meet a substantially higher standard when landmarking religious property.

In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), this Court, noting the need for formal education of Amish children, nevertheless remarked that the values underlying the religious clauses of the first amendment "have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance." *Id.* at 214.

As Former Chief Justice Burger wrote for the Court in *Yoder*, and was later reiterated in *McDaniel* v. *Paty*, 435 U.S. 618 (1978):

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

Wisconsin v. *Yoder*, 406 U.S. 205, 215 (1972).

No one has contended that the United Methodist Church of St. Paul and St. Andrew is not a bona fide religious organization, that its members are not sincere in their religious professions, or that they are not making a "legitimate claim to the free exercise of religion." The court below, however, seemed to

consider that the landmark designation does not impose a burden,—or does not *yet* impose a *direct* burden—on the church's free exercise of religion:

> We recognize that religious institutions "enjoy a constitutionally protected status which severely curtails the permissible extent of governmental regulation in the name of police powers" and that courts have declined to enforce zoning ordinances, for examples, where the restrictions, if enforced, would prohibit or directly impinge upon religious uses. But no such direct impingement is involved. The ultimate effect, if any, on plaintiff's religious activities will be not direct, but purely consequential . . . (citations omitted)[4]

The court's distinction between direct and consequential denials of religious liberty is not the law. Whether the state criminally punishes the practice of religion, or criminally punishes the failure to divert to the state's purposes all the funds that would have been used to support the practice of religion, is of little moment. The burden on religion is equally destructive. Certainly the "consequential" burden here is far greater than the "consequential" burdens struck down in *Thomas* v. *Review Board*, 450 U.S. 707 (1981), and *Sherbert*. The risk that public high school could detroy the faith of Amish children in *Yoder*, was certainly no greater, and probably not as great, as the near certainty that the financial burdens of landmarking will destroy the congregation of St. Paul and St. Andrew.

It is true that designation of the church building as a landmark does not prevent the preacher from delivering a sermon, the congregation from praying, or the children from studying the Bible in church school. But in imposing requirements of maintenance and repair, enforceable by criminal sanctions, upon the congregation and its leaders, the landmark designa-

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[4] *Church of St. Paul and St. Andrew* v. *Barwick* 67 N.Y.2d 510, 496 N.E. 2nd 183, 505 N.Y.S.2nd 24, (1968) as an appendix to Petitioner's brief.

tion acts as a tax upon the assets of the church, and in this case, as a confiscatory tax, pre-empting the lion's share of its donated income prior to the meeting of other expenses, which are not enforceable by criminal sanctions.

The Supreme Court of the United States said, concerning a relatively nominal licensing fee for religious colporteurs:

> It could hardly be denied that a tax laid specifically on the exercise of those freedoms (of religion, speech and press) would be unconstitutional. Yet the license tax imposed by this ordinance is in substance is in substance just that.
>
> * * *
>
> The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance.
>
> * * *
>
> It is . . . a tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the federal constitution.

Murdock v. *Pennsylvania*, 319 U.S. 105 (1973)

Here the "tax" is more than nominal. Because of the deteriorating fabric of the church building and the meager resources available to the small congregation, the congregation was obliged to expend 70% of its contributed income in 1982 for costs of maintenance and repair, independent of its designation as a landmark. Just to bring its structure up to a "holding" condition would have cost an additional $350,000 in 1982, and would cost much more today, while to stabilize the structure, render it serviceable for current needs and to repristinate the exterior to the satisfaction of the Landmarks Commission would require several million dollars.[5]

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[5] L'Heureux, N.J., *op. cit.*, p. 165.

To the extent that landmark designation requires the expenditure of resources dedicated for religious ministries just to maintain the facade, it pre-empts and consumes funds that are then not available for expenses which are necessary to carry out the mission of the church; namely, paying the pastor, organist, or choir director, providing curricular materials for church-school pupils, meeting the congregation's obligations to the general church for overseas missions, and so on. When the obligations imposed by landmarking must (by force of law and criminal penalties) be given first priority over all other obligations, and must be satisfied in full before any others can be satisfied, the burden upon the free exercise of religion is direct, onerous and unavoidable. To the extent that it requires expenditures to renovate, repair or rebuild the exterior to the demanding standards of the Landmarks Preservation Commission, it will exceed the congregation's normal contributions and became confiscatory and therefore fatal to the life of the church.

The New York Landmark Commission has failed to consider the First Amendment problem which is central to this case. The statute provides that designation of a commercial property will be removed if the commercial property owner demonstrates that the landmark statutes destroys the reasonable use of the property. *Penn Central Transportation Co.* v. *New York City,* 438, U.S. 104 (1978). Yet a religious property which has been so designated is not given this "out" by the statute, even where, as in the case at bar, the church has provided adequate proof that compliance with the obligations attendant to such statutes would preclude its continued use of the property. Is not the reasonable use of religious property entitled to more consideration than commercial property, especially where the state interest is at most aesthetic and not by any means compelling? While landmark designation might not necessarily be confiscatory in every case", it does have that effect . . . where plaintiff is deprived of the reasonable use of its land." *Lutheran Church in America* v. *City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, (1974).

In *Trustees of Sailors' Snug Harbor* v. *Platt*, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1968), the New York Supreme Court recognized that the standards for commercial property owners cannot be applied to non-commercial landmark owners. That court enunciated the test for charitable organizations as follows: "[w]here maintenance of the landmark either physically or financial prevents or seriously interferes with carrying out the charitable purpose." 288 N.Y.S.2d at 316. The state has no prerogative to place restrictions on the use to be made by an owner of his own property where constitutionally guaranteed rights are infringed. *Id.* 315. It is clear that the First Amendment protects a church from governmental interference more than commercial property is protected.

The *Sailors' Snug Harbor* test was first applied to a religious organization in *Lutheran Church;* however, the court focused on the "taking" issue, rather than the First Amendment concerns. In that case, the church used the building in question for its administrative offices. Prior to designation, the church had made plans to construct a new building in its stead to better serve the church's needs. *Id.* at 124-25, 316 N.E.2d at 307, 359 N.Y.S.2d at 10-11. Applying the charitable use test, the court found that the landmark statute seriously interfered with the church's charitable uses. *Id.* at 131-32, 316 N.E.2d at 311-12, 359 N.Y.S.2d at 16-17.

As the Church of St. Paul and St. Andrew is a church which seeks the continued use of its property for *worship*, and not merely administrative office space, *amici* respectfully request that this Court consider the question of whether the nonconsensual designation of a church as a landmark imposes an impermissible burden on the free exercise of religion in light of the First Amendment.

Amici are aware, from long experience with many of their local churches, of the discouraging and debilitating effect upon a congregation of having to pour most of its income into the seemingly bottomless pit of the costs of upkeep and repair of an oversize, outmoded and disintegrating church building. While

a congregation can sometimes be inspired and energized to undertake an ambitious campaign to build a *new* church structure, it is much more difficult to elicit interest in maintaining or renovating an *old* one that is daily experienced as inconvenient and inadequate.

If the members of the congregation of the Church of St. Paul and St. Andrew were to lose heart and drift away to other churches (or to none), the church building would soon have to be abandoned, and its demise would be attributable to the civic agency which had so restricted its options and burdened its free exercise. The Landmarks Commission cannot *compel* people to attend or to support a church, and if the members despair of meeting the Commission's requirements, it will have killed the church—a sacrifice of religious liberty to mere aesthetics.

II. THE BURDEN UPON THE FREE EXERCISE OF RELIGION OF THE CHURCH OF ST. PAUL AND ST. ANDREW CANNOT BE JUSTIFIED BY A COMPELLING STATE INTEREST, OR ANY STATE INTEREST WHATEVER.

As the free-exercise cases cited above attest, and *amici* do not dispute, the free exercise of religion can be restricted in the interest of compelling state interests that can be served in no other way, such as protection of public health and safety. But as the minority in the court below correctly observed, landmark designations involve cultural and aesthetic considerations, not health or safety.[6] The majority in the court below did not even reach this issue, nor did it reach the more important first amendment issue, instead holding that the case was unripe for adjudication of constitutional contentions.[7]

Under the police power a church building might be condemned if unsafe for human occupation or infected by con-

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[6] *Church of St. Paul and St. Andrew* v. *Barwick*, app. at 33a.

[7] *Id.* at 505 N.V.S.2d at 33.

tagious disease or permeated by radon gas. It could perhaps be demolished in order to make way for a new highway or as part of a slum-clearance project of urban renewal (*but see Pillar of Fire* v. *Denver Urban Renewal Authority*, 181 Colo. 411, 509 P.2d 1250 (1973)) if other routes or arrangements are not available. In the first set of cases, the state would be acting pursuant to an interest in health and safety that is both legitimate and compelling. In the second set, it would be acting pursuant to the eminent domain power, and just compensation would be paid. In this case, no compensation will be paid. Equally important, the state has no legitimate interest, compelling or otherwise.

In the landmarking cases, the government does not want the land. It doesn't even want the building for conversion to some secular use. Rather, government wants the sacred architecture itself. It does not want the real estate, but the religious creation. The church has created such buildings to the glory of God, or the inspiration of soul, and the state has no cognizable interest in that creation. The free exercise clause does not prevent the state from building a freeway over the most direct route, even if a church is in the way. But it should prevent the state from taking a sacred object as a pretty bauble that it wants for its own.

The preservation of impressive and memorable architecture, including ecclesiastical architecture, is a laudable undertaking, and governmental support of that undertaking is to be commended. But—at least in the case of churches—it should not be advanced at the expense of the very activity that inspired and created it, lest the result be an array of elaborate but empty carapaces abandoned by their former occupants, who have had to move elsewhere to carry on a living enterprise. The preservation of architectural antiquities simply does not rise to the level of importance accorded the free exercise of religion under the First Amendment of the Constitution of the United States. This was recognized by the minority opinion in the court below:

> As the church contends, the basic issue confronting the Court is which is to be preferred—religious freedom or the

> exercise of architectural and cultural interests. . . . As between the free exercise of religion and the aesthetic and community values involved in landmark preservation, the latter is "outweighed by the constitutional prohibition against the abridgement of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community."

Church of St. Paul and St. Andrew, 67 N.V. 2d 510 at 525-26, 496, N.E. 2d, 183 at 197, 505 N.Y.S. 2d at 34. Meyer, J., dissenting, quoting *Matter of Westchester Reform Temple* v. *Brown*, 22 N.Y. 2d 488, 239 N.E. 2d 891, 293 N.V.S. 2d, 297.

Amici concede that the state may have an interest in preserving artifacts of culture, but not at the expense of a church's religious practice. Although the New York Court of Appeals in *Society for Ethical Culture* v. *Spatt*, 51 N.Y. 2d 449, 454, 415 N.E. 2d 922, 925, 434 N.Y.S. 2d 922, 935, (1980) found that "a government may reasonably restrict an owner in the use of his property for the cultural and aesthetic benefit of the community," it must be noted that the court did not weigh the benefits of the community against the infringement on the free exercise of religion. Therefore, the instant case is crucial to the further development of the law in the First Amendment?

Failure to recognize this proper ranking of social values will result in the transforming of active, functioning churches into not just museums, but mausoleums.

III. THE REQUIREMENT THAT THE CHURCH OF ST. PAUL AND ST. ANDREW SEEK RELIEF FROM THE VERY CIVIC AGENCY THAT IMPOSED THE BURDEN ON ITS FREE EXERCISE OF RELIGION IS NOT ONLY A COUNSEL OF FUTILITY AND A FURTHER IMPAIRMENT OF ITS RELIGIOUS LIBERTY, BUT WOULD ENTAIL EXCESSIVE ENTANGLEMENT OF GOVERNMENT WITH RELIGION.

The majority of the court below considered that the constitutional claims were raised prematurely because the church had not pursued all of the options provided by the statute. In the view of *amici*, for the church to pursue those options would compromise the very constitutional right sought to be protected: The right not to subject the free exercise of religion to the supervision of a civil administrative agency that has neither the capacity nor the legitimate authority to rule in matters affecting religion.

The free exercise clause protects not only the bare right to worship, but the church's right to manage its own affairs autonomously. *See* Laycock. *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1388-92, 1394-98 (1981). "It is not only the conclusion that may be reached by the Board which may impinge on the rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 502 (1979); *see also Id* at 507-08.

If a municipal agency has arbitrarily, wrongfully, and over the vehement and continuous objections of a church expropriated the exterior of its sacred structure, the church should not then be compelled to sit down with the thief and plead for the return of a portion of the loot. Such a requirement adds insult to injury and is even more offensive than the original taking. In the view of the church, it has been wronged by a civil agency acting under color of law, and the proper remedy to be applied by the courts is to *reverse* the wrong, not to *compound* it by

further progressive indignities at the hands of the very agency that inflicted the wrong in the faint hope that the wrong might be slightly alleviates.[8]

In sum, as stated by the Interfaith Commission:

> In forcing religious organizations to expend their charitable funds for the maintenance and repair obligations of outmoded and inadequate buildings, the City government is, in fact, directing the Church and Synagogue on how it is to use its resources which have been contributed for its religious ministry, not for architectural preservation.[9]

The scenario that must follow the decision of the New York Court of Appeals, if not reversed, necessarily entails extensive and impermissible entanglement of the Church of St. Paul and St. Andrew with the New York City Landmarks Preservation Commission. *Amici* are aware that "excessive entanglement" of government with religion has been identified by this Court as an aspect of establishment of religion, but it has even more direct implications for free exercise.[10]

While it might be argued that churches which are given the dubious distinction of being designated as "landmarks" may apply for a federal grant from the Historic Preservation Fund,[11] the constitutionality of this grant may be seriously questioned in light of the prohibition against the establishment of religion. This Court has set forth the constitutional test for aid to religion in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1976), where it stated that "first, the statute must have a

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[8] The New York City Landmarks Preservation Commission does not have a history of understanding or sympathy for the plight of churches. See the saga of St. Bartholomew's Episcopal Church as related ina civil action no. ____ filed April 8, 1986, in U.S. District Court for the Southern District of N.Y. as well as numerous instances of bureaucratic callousness related in L'Heureux, *supra*, pp. 173 ff.

[9] L'Heureux, *supra*, p. 165, app. at 127a.

[10] *See* Laycock, *supra*, 81 colum.L.Rev. at 1378-88, 1397-98 (1981).

[11] 16 U.S.C. § 470 (1980).

secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. . . . Finally, the statute must not foster an 'excessive entanglement with religion.'"

In order to demonstrate "hardship" to the satisfaction of the Commission, the church must reveal its available assets, its anticipated income, its prospects for fundraising and its plans for other expenditures that must compete with maintenance and repair of the facade for the available resources. Then the Commission must determine in the light of this data whether the church's plans for demolition and replacement of the present structure (or even for minor exterior alterations or for various alternatives for maintenance and stabilization of the existing structure) are permissible, or whether the expectations of the Commission would constitute a "hardship."

The Commission must make this determination without the benefit of guidelines in the statute under which it operates as to how religious considerations are to be weighed against architectural considerations. Its members have neither the expertise nor the civil capacity to be able to decide such matters. This represents precisely the sort of excessive entanglement of government with religion against which this Court has warned and which would amount to a regression from First Amendment protections achieved to date.

CONCLUSION

Amici submits that a correct application of the First Amendment decisions in the landmark context would require the courts to determine that the excessive regulation of religious organizations and the usurpation of funds which were devoted to religious ministry cannot be justified merely to further the aesthetic benefit of the community.

For the forgoing reasons Amici urge the Court to issue the *Writ of Certiorari* in the instant case.

Respectfully submitted,

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